MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-789

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., *Petitioners,*

v.

PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY MEMORANDUM FOR PETITIONERS

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1. The Memorandum for the Respondents in Opposition (Resp. Memo) acknowledges, as it must, that Section 6 of the Occupational Safety and Health Act of 1971 (29 U.S.C. § 655) requires "determinations" of the Assistant Secretary of Labor for Occupational Safety and Health (OSHA) to be "supported by substantial evidence in the record considered as a whole." (Resp. Memo. at 3). Respondents also concede that the court below did not apply that test to OSHA's determination that the chemical ethyleneimine (EI) is a human carcinogen (Resp. Memo at 2-3). Since respondents do not cite any statutory language or legislative history justifying the failure of the court below to subject this OSHA determination to the Congres-

sionally-mandated scope of review (see Petition at 15-20), Respondent's Memorandum in Opposition constitutes a confession of error justifying summary reversal of the decision below.

2. Respondents assert (Resp. Memo at 2) that OSHA's determination that EI is a human carcinogen "was premised upon the criterion that substances *shown to cause cancer in two animal species* are to be treated as posing an impermissible danger of cancer to man 'until evidence to the contrary is produced'." (Emphasis added). Respondents implicitly concede that one of the two animal species exposed to EI (mice) did not develop any cancerous growths.[1] It is impossible to square this concession with respondent's claim that there is "no doubt" that the Secretary's factual determination that EI causes cancer in two animal

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[1] Both respondents and the court below refer to a statement in mice study that some of the mice studied developed tumors with "malignant potentiality," but that is hardly the "prior demonstration of carcinogenicity" (39 *Fed. Reg.* 3757), which OSHA required before making extrapolations to man. As this Court recently observed in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 43 L.W. 4091, 4093 (Dec. 23, 1974), "we may not supply a reasoned basis for the agency's action that the agency itself has not given *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 . . . ."

This is particularly appropriate where the Agency has been placed on notice that its determination lacks a reasoned basis. In an earlier decision vacating and remanding the emergency temporary standard as to EI because of the inadequacy of the statements of reasons for issuing the standard, another panel of the Third Circuit pointedly noted:

> Innes is unclear as to whether the tumors produced in mice were malignant and specifically cautions against extrapolating from his data as to the carcinogenic effect in rodents to that in man.

Dry Color Manufacturers' Ass'n, Inc. v. *Department of Labor*, 486 F.2d 98, 103 (3d Cir. 1973).

species is supported by substantial evidence. Indeed it would seem clear that OSHA has not complied with its own criterion for extrapolating from animal studies to man (See Petition at 20-23).

3. Respondents contend that OSHA's determination rests upon a "reasonable inference" from the laboratory studies on rats and mice and therefore should be upheld. One difficulty with this position is that the court below did not subject OSHA's determination to any such "reasonable inference" test. The court below held that since there was no direct evidence that EI was a human carcinogen (indeed, the only evidence in the administrative record is to the contrary),[2] OSHA's extrapolation from animal studies to man was a "nonfactual policy decision" and that review of such a decision is limited to determining whether there is "consistency between the Secretary's rule and the statutory language and purpose." (Pet. App. 8(a)-9(a)).

The scope of review applied by the court below is clearly a narrower standard than the "arbitrary or capricious" test usually applicable to informal rulemaking (5 U.S.C. § 706(2)(A)). As this Court stated in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), "[s]crutiny of the facts does

[2] Respondents assert that the epidemiological study demonstrating that EI had produced no harmful effects in exposed workers "was criticized by epidemiological experts" (Resp. Memo at 5, n.3), implying that OSHA had reviewed that study and adopted that criticism. In fact, respondents conceded in the court of appeals that this study was inadvertently *ignored* by them during the rulemaking proceeding (Brief of Respondents at 35-36). The criticism to which respondents refer was adduced in the form of an affidavit signed by a government employee and attached to respondents' brief in the court below. This affidavit is not part of the administrative record being reviewed, and has never itself been subjected to critical review.

not end, however, with the determination that the Secretary has acted within the scope of his statutory authority . . . . the court must [also] consider whether the decision was based on a consideration of the relevant factors and whether there has been *a clear error of judgment.*" (Emphasis added). In *Ethyl Corp.* v. *Environmental Protection Agency* (D.C. Cir., Jan. 28, 1975), the court commented upon this standard of review:

> Certainly a determination made in the absence of any evidence in the record to support it would lead a reviewing court to conclude that a "clear error or judgment" had occurred. However, a reviewing court could reach a similar conclusion in the presence of some evidence supporting the agency determination. Since a court must review "the entire record," it may well be that the evidence detracting from the agency's conclusion is so overwhelming or so persuasive, or the agency's approach so one-sided, or the decision-making process so flawed, that a reviewing court must conclude that the agency erred in the exercise of its rulemaking power. Or, if there is an essential point or element missing in the logical progression toward the conclusion that the agency reaches, then the agency's action likewise may be arbitrary or capricious, because it is not supported by a logical thought process.

(Slip Op. at 43-45, footnotes omitted). Despite the Congressional admonition to conduct a more rigorous "substantial evidence" review of OSHA determinations, the court below has ruled that such determinations need not be supported by any evidence and that countervailing evidence can be ignored.

The approach adopted by the court below results in judicial review that is no more than a sham. Respond-

ents' attempt at justifying the OSHA determination rubber-stamped by the court below avoids the principal issue petitioners have presented to this Court—did the court below apply the appropriate scope of review in this case. This is a vital issue not only for this case but for numerous other cases presently pending.

For example, in *Synthetic Organic Chemical Manufacturers Ass'n* v. *Brennan*, Nos. 74-1129, 1149, and 1268 (3d Cir., Dec. 17, 1974), petitioners herein challenged OSHA's determination that the chemical chloromethyl methyl ether is a "known potent human carcinogen" (39 *Fed. Reg.* 3759 (Jan. 29, 1974), App. 847).[3] Petitioners emphasized that there was not one shred of evidence to support that determination, and OSHA made no effort to point to any such evidence. Without any discussion of the absence of such evidence, the court below cryptically held: "Again, the issue is the same as that in the EI appeal, and again in this case the Secretary's determination finds adequate support in the record." (Slip Op. at 4). The issue posed in both cases is the lack of substantial evidence to support a factual finding by OSHA. In both cases the court below has ruled, despite the clear mandate of section 6 of the Act, that the Secretary need not base his determinations on evidence. That is an erroneous decision with tremendous ramifications for industry and it deserves to be reviewed by this Court.

4. The respondents' bald assertion that there is no conflict in the circuits on the scope of review of OSHA

[3] This and related petitions for review were severed from the EI petition by the court below. See Petition at 4. Petitioners have been granted an extension of time to May 16, 1975, to file a petition for certiorari in those cases, and the Oil, Chemical and Atomic Workers International Union, AFL-CIO and the Health Research Group have moved for an identical extension.

determination is refuted by a careful reading of the cases cited, most of which are discussed in our Petition at 23-29. While *Society of the Plastics Industry* v. *Occupational Safety* and *Health Administration, et al.* (2d Cir., Nos. 74-2284, et al., Jan. 31, 1975) does appear to have applied an "arbitrary or capricious" standard of review (in the face of an explicit Congressional decision to require the more rigorous substantial evidence test),[4] even that case does not go as far as the absolute deference which the Third Circuit appears to be ready to give to OSHA "legislative type" determinations, *i.e.*, those supported by little or no factual evidence.

On the other hand, another recently decided case, one not cited by respondents, *Ethyl Corp.* v. *Environmental Protection Agency* (D.C. Cir., Jan. 28, 1975), supports our argument that unlike the Third Circuit's decision below, the D.C. Circuit does require sound factual support for rulemaking determinations of a factual nature. *Ethyl* involved the "arbitrary or capricious" scope of review; the court carefully examined the purported evidentiary bases for EPA's judgment that lead emissions were hazardous to the public, and set the regulation aside for want of adequate evidence. Surely that court would conduct a searching evidentiary review where the scope of review is the more demanding one of "substantial evidence" on the whole record.

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[4] The decision also ignores Judge Friendly's opinion in *Associated Industries of New York State, Inc.* v. *Department of Labor*, 487 F.2d 342 (2d Cir. 1973). Whether it thus eliminates "any potential conflict" between the second and third circuits, as respondents claim (Resp. Memo at 6, n.4), remains to be seen. *Society of the Plastics Industry* was decided by a panel composed of Justice Clark and two retired District Court judges, all sitting by designation.

CONCLUSION

In *Associated Industries of New York States, Inc.* v. *Department of Labor,* the court stated:

> While we have felt constrained to determine and sustain the applicability of the substantial evidence test, it may well be that the controversy is semantic in some degree, at least in the context of informal rulemaking, and that it lacks the dispositional importance that respondents imply. (487 F.2d at 349).

Citing that statement, the same respondents assert in this Court that petitioner's challenge to the scope of review employed by the court below is a "semantic controversy" without "dispositional importance." (Resp. Memo. at 6) Nothing would be further off the mark. The OSHA determination that EI is a human carcinogen is not supported by the administrative record. It was only upheld on review by transforming that factual finding into a "legislative policy decision" which, the court below held, needs no evidentiary support to pass muster. This is an extremely important issue, upon which the circuits are clearly divided, and it should be settled by this Court.

Respectfully submitted,

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